Supreme Court, U.S.
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No. 99-158

In The

Supreme Court of the United States

TERRY LYNN KING,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I. Is the harmless error analysis conducted by Tennessee courts when an aggravating circumstance is found invalid constitutionally sufficient?

II. Does Tennessee's pre-1989 aggravating factor that the murder was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind" violate the Eighth and Fourteenth Amendments of the United States Constitution?

TABLE OF CONTENTS

Page

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT 3

I. THE HARMLESS ERROR ANALYSIS CONDUCTED BY THE TENNESSEE STATE COURTS WHEN AN AGGRAVATING CIRCUMSTANCE IS FOUND INVALID IS CONSTITUTIONALLY SUFFICIENT 3

II. TENNESSEE'S HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE DOES NOT VIOLATE ANY PROVISION OF THE UNITED STATES CONSTITUTION 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Chapman v. California, 386 U.S. 18 (1967) 5, 6, 7

Clemons v. Mississippi, 494 U.S. 738 (1990) 4, 5

Furman v. Georgia, 408 U.S. 238 (1972) 7

Godfrey v. Georgia, 446 U.S. 420 (1980) 8, 9

Gregg v. Georgia, 428 U.S. 153 (1976) 7, 8, 9

Houston v. Dutton, 50 F.3d 381 (6th Cir. 1995) 10

Maynard v. Cartwright, 486 U.S. 356 (1988) 8, 9, 11

State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994) 4

State v. Howell, 868 S.W.2d 238 (1993) 4, 5, 6

State v. King, 718 S.W.2d 241 (Tenn. 1986) 1, 2, 9

State v. King, 989 S.W.2d 319 (Tenn. 1999) 3, 6

State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992) 4

State v. Williams, 690 S.W.2d 517 (Tenn. 1985) 9, 10

Zant v. Stephens, 462 U.S. 862 (1980) 4, 7

STATUTES

Tenn. Code Ann. § 39-2-203(i)(2)(1982) 3

Tenn. Code Ann. § 39-2-203(i)(5)(1982) 3, 7

Tenn. Code Ann. § 39-2-203(i)(6)(1982) 3

Tenn. Code Ann. § 39-2-203(i)(7)(1982) 3

Tenn. Code Ann. § 40-30-101 *et seq.* 2

TABLE OF AUTHORITIES – Continued

Page

Tenn. Code Ann. § 40-30-111 (Repealed 1995) 6

28 U.S.C. § 1257(a) 1

OPINION BELOW

The opinion of the Supreme Court of Tennessee, published at 989 S.W.2d 319, was filed on April 12, 1999, and is attached as Appendix 1-40 to King's petition for writ of certiorari.

STATEMENT OF JURISDICTION

The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Terry Lynn King was convicted in 1986 in Knox County Criminal Court for felony murder in the perpetration of kidnapping and armed robbery. *State v. King,* 718 S.W.2d 241 (Tenn. 1986). King was sentenced to death by electrocution for the murder and to 125 years' imprisonment for the armed robbery. King's confession and other evidence introduced at trial showed that the defendant and the victim, Diana Kay Smith, spent the day of the murder together. The parties used drugs and had sex on three occasions. When the victim confronted the defendant and claimed he had raped her, the defendant forced the victim into the trunk of her car. *Id.* at 244. He enlisted the aid of a co-defendant, Randall Sexton, and told Sexton he had a woman in the trunk of the car and needed a rifle and a shovel. *Id.* Defendant and Sexton then proceeded with the victim to a secluded wooded area where the defendant pointed the rifle at the victim and forced

her to the ground. Defendant told the victim he was not going to kill her but that others were coming to have sex with her. *Id.* The victim begged for her life and offered the defendant money. He ordered her to turn her head and then fatally shot her in the back of the head. *Id.* The defendant and Sexton threw the victim's body in a quarry where it was discovered several days later. *Id.* at 244-45.

Following the guilty verdict, and in a separate proceeding, the jury found the presence of four aggravating factors. Specifically, the jury found (1) the defendant was previously convicted of one or more felonies, which involved the use or threat of violence; (2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; (3) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of the defendant or another; and (4) the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any rape, robbery, larceny or kidnapping. *Id.* at 248. Further, the jury found that no mitigating circumstance outweighed the statutory aggravating circumstances and sentenced King to death for the murder.

King's convictions and sentences were affirmed by the Tennessee Supreme Court on direct appeal. *State v. King*, 718 S.W.2d 241 (Tenn. 1986). No petition for writ of certiorari was filed with this Court. King then instituted post-conviction proceedings pursuant to Tenn. Code Ann. § 40-30-101 *et seq.* alleging, *inter alia*, cumulative error and that the "heinous, atrocious or cruel" aggravator as presented to the jury was unconstitutionally vague.

The trial court held an evidentiary hearing and denied King's post-conviction petition. On appeal, the Tennessee Court of Criminal Appeals denied relief. The Tennessee Supreme Court granted discretionary review and also denied defendant's petition for post-conviction relief on April 12, 1999. *State v. King*, 989 S.W.2d 319 (Tenn. 1999). It is from this judgment the defendant seeks this Court's review on a writ of certiorari.

ARGUMENT

I. THE HARMLESS ERROR ANALYSIS CONDUCTED BY THE TENNESSEE STATE COURTS WHEN AN AGGRAVATING CIRCUMSTANCE IS FOUND INVALID IS CONSTITUTIONALLY SUFFICIENT.

At petitioner's sentencing hearing, the jury sentenced the defendant to death based upon four aggravating circumstances: (1) the murder was committed by the petitioner while he was engaged in committing rape, robbery, larceny, or kidnapping of the victim; (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; (3) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the petitioner; and (4) the petitioner was previously convicted of one or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person. Tenn. Code Ann. § 39-2-203(i)(7),(5),(6), and (2)(1982). On post-conviction appeal, the Tennessee Supreme Court found that the felony murder aggravating circumstance codified at Tenn. Code Ann. § 39-2-203(i)(7)(1982), as

applied to petitioner, was invalid. Petitioner had been convicted of felony murder. Under the dictates of *State v. Middlebrooks*, 840 S.W.2d 317, 346 (Tenn. 1992), the court held that when a defendant is convicted of felony murder, the use of the felony murder aggravating circumstance, without more, fails to sufficiently narrow the class of death-eligible offenders. *Middlebrooks, supra*, was decided on Tennessee constitutional law and not based on any violation of federal constitutional law. *See State v. Bigbee*, 885 S.W.2d 797, 816 (Tenn. 1994) and *State v. Howell*, 868 S.W.2d 238, 259 n.7 (1993).

Tennessee is a "weighing" state. That is, once a jury has determined that a defendant is guilty of capital murder and found the presence of at least one statutory aggravating circumstance, the jury must weigh such factors against any and all mitigating circumstances. *Zant v. Stephens*, 462 U.S. 862, 890 (1980). However, the finding by a state appellate court that one or more of the aggravating circumstances is invalid does not automatically result in reversal of the sentence of death. In *Clemons v. Mississippi*, 494 U.S. 738 (1990), this Court approved two methods of appellate review by a "weighing" state. The appellate court can reweigh the aggravating and mitigating circumstances or undertake harmless error analysis. *Id.* at 754. Regardless of which method of review the appellate court chooses to adopt, the key requirement is the protection of individualized sentencing. *Id.*

Tennessee appellate courts have adopted the harmless error method in reviewing capital cases when one of the aggravating circumstances submitted to the jury is determined to be invalid. The preeminent case describing and detailing the requirements of Tennessee's harmless

error analysis is *State v. Howell*, 868 S.W.2d 238 (Tenn. 1993). *Howell* adopted and expanded on the "beyond a reasonable doubt" standard of harmless error review set out by this Court in *Chapman v. California*, 386 U.S. 18, 24 (1967). *Clemons v. Mississippi, supra*, specifically approved the *Chapman* "beyond a reasonable doubt" harmless error analysis as a permissible approach for state appellate courts to use in reviewing a capital sentence when one of the aggravating circumstances is determined to be invalid. *See Clemons*, 494 U.S. at 754.

The *Howell* harmless error analysis adopted by the Tennessee Supreme Court was based on this Court's announced standard of review to be applied to a capital sentencing jury's consideration of an invalid aggravating factor. "[T]he *Chapman* harmless error standard requires that an appellate court conclude, beyond a reasonable doubt, that the sentence would have been the same had the sentencing authority given no weight to the invalid aggravating factor." *Howell* at 260, *quoting Stringer v. Black*, 503 U.S. 222 (1992). The *Howell* standard requires a complete examination of the record for the presence of factors that potentially influence the sentence ultimately imposed.

> These include, but are not limited to, the number and strength of the remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality and strength of mitigating evidence.

Howell at 261.

In petitioner's case, the Tennessee Supreme Court carefully reviewed the entire record and applied the *Howell* factors. The Court found beyond a reasonable doubt that petitioner's sentence would have been the same had the jury given no weight or consideration to the felony murder aggravator. *State v. King*, 989 S.W.2d at 326. Petitioner's assertion that the reviewing appellate court, in conducting such an analysis, is required to consider every conceivable error in a cumulative fashion is not what this Court has dictated as the standard of review. Such a review is not necessary to protect individualized sentencing or to meet the requirements of *Chapman* and its progeny.

Further, any consideration of cumulative error would be in violation of Tennessee's Post-Conviction Procedure Act which allows a post conviction hearing on "all grounds the petitioner may have, except those grounds which the court finds should be excluded because they have been waived or previously determined." Tenn. Code Ann. § 40-30-111 (Repealed 1995). As the Tennessee Supreme Court correctly held in petitioner's case, "*[H]owell* was never intended to be a vehicle for reviewing or relitigating harmless errors or errors that have been previously determined or waived." *State v. King*, 989 S.W.2d at 327.

Petitioner's argument that the Tennessee Supreme Court's application of harmless error analysis conflicts with that used by other United States Courts of Appeals is incorrect. (*See* Petition at 12-14). Petitioner's cited cases involve direct appeals of non-capital cases. Not one case cited by petitioner involves appellate court review of a

defendant's capital sentence when, as here, an aggravating circumstance has been found invalid on post-conviction appeal. In fact, petitioner cannot cite this Court to one instance wherein other United States Courts of Appeals are extending the *Chapman* "harmless beyond a reasonable doubt standard" to allow relitigation of direct appeal previously determined issues on post-conviction appeal. This issue does not warrant review.

II. TENNESSEE'S HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE DOES NOT VIOLATE ANY PROVISION OF THE UNITED STATES CONSTITUTION.

The petitioner contends that Tenn. Code Ann. § 39-2-203(i)(5)(1982) is unconstitutional because it fails to sufficiently channel the sentencer's consideration of whether to impose the death penalty. This assertion is without merit.

This Court has held that an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and "provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

In *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court reviewed Georgia's version of this aggravator. Georgia's statute provided as an aggravating circumstance that the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery of the victim. This Court concluded

that Georgia's aggravator was not unconstitutional on its face, and there was no reason to assume that the Georgia Supreme Court would adopt an unconstitutional construction of the aggravating circumstance.

Two years later in *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court concluded that Georgia's Supreme Court had applied the aggravator to that particular case in such a way that it could reasonably be construed to apply to any murder. In *Godfrey* there was no evidence of an aggravated battery being committed upon either of the victims, the State repeatedly informed the jury that torture was not involved, and there was no evidence demonstrating depravity of mind. *Id.*, at 432. Thus, this Court concluded that the Georgia Supreme Court's application of the aggravator to murders that were outrageously or wantonly vile, horrible, or inhuman, without finding that the actual killings met any of three listed circumstances of torture, depravity of mind, or aggravated battery of the victim, rendered the aggravating circumstance unconstitutionally vague as applied. *Id.*, at 432-433.

This Court expounded on the principles established in *Gregg* and *Godfrey, supra*, in analyzing Oklahoma's parallel aggravator in *Maynard v. Cartwright*, 486 U.S. 356 (1988). Oklahoma's aggravator simply provided that the killing had to be "especially heinous, atrocious or cruel." *Id.*, at 359. This Court held that an instruction on the bare terms of the statute alone was unconstitutionally vague, but as long as some narrowing construction was placed on the aggravating circumstance, it was constitutional. *Id.*, at 364-365. This Court used the example of requiring that aggravating circumstance to include some kind of torture or serious physical abuse in order to narrow its

application. *Id.*, at 365. But this Court specifically held that torture or serious physical abuse are not the only types of limiting circumstances that could be used; they were simply examples of limiting circumstances that would be constitutionally acceptable. *Id.*, at 365.

Under the standards set forth in *Gregg*, *Godfrey*, and *Maynard*, *supra*, Tennessee's aggravator at the time of the petitioner's offense was constitutional. At that time, Tenn. Code Ann. § 39-2-203(i)(5)(1982) provided as an aggravating circumstance that "the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind." Thus, Tennessee's statute, unlike Oklahoma's statute in *Maynard*, provides a narrowing construction in the language of the aggravator itself. The jury could not apply the aggravator upon merely finding that the murder was heinous, atrocious or cruel; instead the jury had to find that it was heinous, atrocious, or cruel because it involved either torture or depravity of mind.

The Tennessee Supreme Court, in reviewing petitioner's renewed attacks during post-conviction proceedings, noted that it had addressed the identical issue on direct appeal and held that failure to define for the jury the terms "to aggravate" and "torture" as requested by the defendant was not error. Further, the court on direct appeal had reviewed the evidence and found that it supported the aggravating circumstance as defined by the court in *State v. Williams*, 690 S.W.2d 517 (Tenn. 1985). *See State v. King*, 718 S.W.2d 241, 249 (Tenn. 1986).

The specific referral on direct appeal by the Tennessee Supreme Court to the *Williams* decision is important.

Clearly, the court applied a narrowed construction, limited to torture or depravity of mind, and found the evidence in petitioner's case clearly sufficient to meet this narrow definition. In *Williams*, the Tennessee Supreme Court conducted a detailed analysis of the "heinous, atrocious or cruel" aggravator; examined its application in other jurisdictions; defined specific examples of torture and depravity of mind; and reaffirmed its prior holdings that the aggravator requires specific evidence of torture or depravity of mind. *Williams* did not, as petitioner suggests in his petition, hold that all cases wherein the terms "heinous," "atrocious," "cruel," "torture," and "depravity of mind" were not defined was unconstitutionally vague. Rather, *Williams* held that the aggravator contains limiting language in the aggravator itself: heinous, atrocious or cruel is limited to cases involving torture or depravity of mind. *Williams* at 529.

Petitioner's argument that the State has conceded that the heinous, atrocious or cruel aggravator is unconstitutional is without merit. Petitioner relies on the decision in *Houston v. Dutton*, 50 F.3d 381 (6th Cir. 1995). In *Houston*, the State conceded that the aggravator, as applied to the facts in *Houston* only, was unconstitutional. *Id.*, at 387 (. . . and the State concedes the instruction to be erroneous *in this case.*" *Id.* (emphasis added). Certainly, the state has not and does not concede that the heinous, atrocious or cruel aggravating circumstance as drafted and applied in this case is unconstitutional.

In summary, because the self-contained limiting language found in the pre-1989 Tennessee heinous, atrocious or cruel aggravating circumstance instruction complies

with this Court's mandate in *Maynard*, the petitioner's vagueness challenge does not warrant review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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